BROWN & HOOF *v.* CORNWELL *et al.*

Jan. 30, 1908.

[60 S. E. 623.]

1. Mechanics' Liens—Proceedings to Perfect—Filing Account for Lien.—The filing of an account as required by Code 1904, § 2476, providing that a contractor, to perfect a mechanic's lien, must file an account, etc., is the initial step in the establishment of a mechanic's lien; and unless the work done or materials furnished were contracted for as an entirety, and it is not so set out in the account filed, the account must set out substantially the amount of the work done and materials furnished and the prices charged therefor.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 34, Mechanics' Liens, §§ 256-258.]

2. Same—"Estimate."—An account for building materials for a dwelling, filed for the establishment of a mechanic's lien, which omits to show the prices charged for the different items, and which, for the purpose of showing that the materials were contracted for at a gross sum, merely recites "amount of estimate, $450," is insufficient, under Code 1904, § 2476, providing that a contractor, to perfect a lien, must file an account showing the amount and character of the work done or materials furnished, the prices charged therefor, etc.; the word "estimate," defined as a valuation based on opinion and roughly made from imperfect data, etc., not conveying the idea that the materials were contracted for as an entirety at the price named.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 34, Mechanics' Liens, §§ 256-258.

For other definitions, see Words and Phrases, vol. 3, pp. 2492-2494.]

3. Appeal—Record—Presumptions.—Where the decree appealed from recites that there was a demurrer to the original bill, which was sustained, that plaintiff filed an amended bill, and that a demurrer to the amended bill was sustained, the court must assume that there was a written demurrer filed to the amended bill, on which the circuit court was warranted in ruling.

4. Mechanics' Liens—Actions to Enforce—Defenses—Availability.—In a suit to enforce a mechanic's lien brought against the owner of the property and the trustee in a deed of trust thereof, either defendant may resist the effort to establish the lien, and a demurrer to the bill, interposed by either, if sustained, defeats the lien and inures to the benefit of both.

5. Appeal—Harmless Error—Demurrers.—One seeking to enforce a mechanic's lien in a suit against the owner of the property and the trustee in a deed of trust thereof is not prejudiced by the fact that the record does not disclose in behalf of which defendant demurrers to the bill, which the court sustained, were interposed.

Appeal from Circuit Court, Prince William County.

Suit by Brown & Hoof against J. C. Cornwell and another. From a decree sustaining demurrers to the original and amended bills, plaintiffs appeal. Affirmed.

Robert A. Hutchison, for appellants.
Thos. H. Lion, for appellees.

WHITTLE, J. This is a suit in equity, brought by the appellants, as general contractors, to subject a dwelling house, the property of the appellee J. C. Cornwell to a mechanic's lien for $450, subject to credits for lumber and other building materials alleged to have been furnished by the appellants to the owner in the erection and construction of the building. The appeal is from a decree of the circuit court, sustaining demurrers to the original and amended bills in the case.

The controlling question to be determined involves the sufficiency of the account filed by the claimants to constitute a valid mechanic's lien under the statute.

Section 2476, Va. Code, 1904, provides, among other things, that "a general contractor, in order to perfect the lien given by the preceding section, shall at any time after the work is done and the material furnished by him, and before the expiration of sixty days from the time such building * * * is completed, or the work thereon otherwise terminated, file in the clerk's office in the county or corporation in which the building is * * * an account showing the amount and character of the work done or material furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant, or his agent, with a statement attached declaring his intention to claim the benefit of said lien and giving a brief description of the property on which he claims the lien." The statute then devolves upon the clerk the duty to record the account or statement in a book to be kept for the purpose, "and to index the same in the name as well of the claimant of the lien as of the owner of the property," and declares that "from the time of such filing all persons shall be deemed to have notice thereof."

The account relied on in this instance altogether omits to show the prices charged for the items of which it is composed. Nor does it appear, either from the account or accompanying statement, that the materials were contracted for at a gross sum, so as to bring the case within the influence of that line of decisions of which Taylor *v.* Netherwood, 91 Va. 88, 20 S. E. 888, is a conspicuous type.

In Gilman *v.* Ryan, 95 Va. 494, 28 S. E. 875, the court, in discussing the effect of a similar omission, at page 497 of 95 Va., and page 876 of 28 S. E., observes: "This defect is not an in-

accuracy in the account, which the statute (section 2478) declares shall not invalidate the lien, but an entire failure to state in the account what the statute, for wise reasons, it must be presumed, requires shall be stated."

That case, on the point in question, decides that: "The filing of the account, as required by statute, is the initial and one of the most important steps of the establishment of a mechanic's lien. Unless the work done or materials furnished are contracted for as an entirety, and it is so set out in the account filed, the account must set out substantially the amount of the work done and materials furnished, and the prices charged therefor."

In the case in judgment it is contended that the abbreviations and figures in the last line of the account, namely, "Amt. of est., $450.00," are tantamount to the statement that the materials were contracted for as an entirety at the price named. But it would seem that such is not the import of the foregoing excerpt from the account filed. The idea conveyed by the words, "amount of estimate," in an account rendered, is that they indicate the approximate valuation of his own goods by the seller, rather than the coming together of the minds of both parties upon the exact price to be charged.

In the Standard Dictionary, the word "estimate" is defined: "A valuation based on opinion or roughly made from imperfect or incomplete data; a calculation not professedly exact; appraisement; as, an estimate of the amount of grain in a bin. * * * "

Webster's International Dictionary gives the following definition: "To judge and form an opinion of the value of, from imperfect data, either the extrinsic or intrinsic value; to fix the worth of roughly or in a general way; as, to estimate the value of goods or land; * * * a valuing or rating by the mind, without actual measuring, weighing, or the like; rough or approximate calculation; as, an estimate of the cost of a building, or of the quantity of water in a pond. * * * "

It is clear that the account relied on does not conform to the requirement of the statute in the particular indicated, and therefore, the attempt to acquire a mechanic's lien never having been perfected, the demurrers to the orignial and amended bills were rightly sustained.

The assignments, that the demurrer to the original bill ought not to have been considered, because it does not appear on whose behalf it was filed, and that there was no written demurrer to the amended bill, are not well taken.

Considering the last proposition first: The decree appealed from recites that there was a demurrer to the original bill, which was sustained so far as appellant's alleged lien is concerned; "and the said plaintiffs, by leave of court, having filed their amended * * * bill, * * * and the said respondent having

demurred to the said amended * * * bill," that demurrer was likewise sustained. Upon familiar principles, these recitals in the decree import verity, and this court must assume that there was a demurrer to the amended bill upon which the circuit court was warranted in ruling.

With respect to the other objection, that it does not appear on behalf of which defendant these demurrers were filed: There were only two defendants to the suit, namely, the owner of the building sought to be subjected, and the trustee in a deed of trust executed by the owner upon the property to secure a debt. Hence it was competent for either defendant to resist the effort of the plaintiffs to fix a mechanic's lien upon the building; and the demurrer of either, if sustained, would defeat the lien and inure to the benefit of both. Consequently the plaintiffs could not have been prejudiced by the fact that the record does not disclose in behalf of which defendant the demurrers were interposed.

The distinction between defenses which are personal to one defendant and those which are common to all is well illustrated by the following authorities:

In McCartney *v.* Tyrer, 94 Va. 198, 202, 26 S. E. 419, 421, this court said: "The defense of the statute of limitations was not made by the debtor, the defendant company, but by * * * its principal creditor. The defense is generally a personal privilege, and may be asserted or waived by a defendant at his election. Clayton, etc., *v.* Henley, 32 Grat. 72, and Smith *v.* Hutchinson, 78 Va. 683. When, however, a court of equity has taken possession of the estate of the debtor for the purpose of distribution, and proceeded to ascertain the debts and incumbrances to enable it properly to administer and distribute the assets, an exception to the general rule is allowed, and any creditor interested in the fund is permitted to interpose the defense of the statute of limitations." The court cites numerous authorities for that proposition.

So, also, in Cartigne *v.* Raymond, 4 Leigh, 579, it was held: "Upon a bill in chancery by a distributee against an administrator and his surety, alleging that the administrator had not duly accounted, and praying an account, the bill is taken pro confesso as to the administrator, but the surety answers, and proves that the plaintiff, on a full and final settlement, has released the administrator, and so is not entitled to an account, upon which the chancellor dismisses the bill with costs as to both defendants, the bill was properly dismissed as to both defendants."

Again, in Harrison et al. *v.* Walton's Ex'r, 95 Va. 721, 727, 30 S. E. 372, 734, 41 L. R. A. 703, 64 Am. St. Rep. 830, the court observes: "We are of opinion that the court did not err in sustaining the demurrer of the executor to the bill and dismissing the cause as to him. Neither did it err in dismissing it to Mrs. Harri-

son, although she failed to appear and make defense. The defense of the executor, her codefendant, was not personal to him. It went to the foundation of the appellant's right to recover upon the case stated.'

So, in the case in hand, the demurrers put in issue the existence of the merchanic's lien, and the dismissal of the original and amended bills as to both defendants was a corollary to sustaining the demurrers, no matter by which defendant they may have been interposed.

For these reasons, we are of opinion to affirm the decree.

Affirmed.

DRAKE *v.* BLYTHE *et al.*

March 12, 1908.

[60 S. E. 632.]

Wills—Construction—Joint Tenancy—Survivorship.—Code 1849, c. 116, § 19, and Code 1887, § 2431 [Code 1904, § 2431], provide that the provision abolishing survivorship between joint tenants shall not apply to an estate devised to persons in their own right, where it appears from the instrument that it was intended that the part of the one dying should then belong to the others. A will devised a 70-acre farm, which constituted the home of testator, his wife, and two unmarried daughters, in its entirety to his wife for life, at her death to the daughters and their heirs, and if they should die without heirs to a grandson. The widow died after testator and after one of the daughters. Held that, under the statute, the interest of such daughter passed to the surviving sister, and not to the grandson; the will disclosing an intent to perpetuate the home for the benefit of his wife and daughters.

Appeal from Circuit Court, Southampton County.

Bill by Junius W. Drake against Caroline F. Blythe and others. From the decree, complainant appeals. Affirmed.

John N. Sebrell, Jr., for appellant.

W. J. Sebrell, for appellees.

WHITTLE, J. This case (a suit in equity for partition) involves the construction of the will of Elijah Joyner, deceased, which is as follows:

"October 15, 1869. Eye give to my wife all my estate her life and at her deth eye give to my two daughters Eveline M. Joyner and Caroline F. Joyner to them and there heirs forever and if they dye with douth are eye give it to son Junius W. Joyner, the son of son my daughter Mary Jane Drake Eye give to my daughter Mary Jane Drake five dollars."